



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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September 30, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
#7003-2260-0001-7778-9579

Ref: 8ENF-W

Melvin F. Zelmer, President,
Managing Member & Registered Agent
Zelmer, Inc., and
Spencer Heights, LLC
27172 469th Avenue
Tea, South Dakota 57064

Re: Findings of Violation and Administrative
Compliance Order,
Docket No. **CWA-08-2004-0076**

and

Administrative Compliance Order on Consent,
Docket No. **CWA-08-2004-0075**

Dear Mr. Zelmer:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that Zelmer, Inc. and Spencer Heights, LLC ("Respondents"), are in violation of sections 301, 402, and 404 of the Clean Water Act, as amended ("CWA"), 33 U.S.C. §§ 1311, 1342, and 1344. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 and 1344. Section 402 of the CWA requires that an authorizing National Pollutant Discharge Elimination System ("NPDES") permit be obtained prior to the discharge of storm water into waters of the United States. Section 404 of the CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers ("Corps") prior to the discharge of dredged or fill material into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 40 C.F.R. § 122.2 and

33 C.F.R. § 328.3.

Specifically, EPA has determined that the Respondents discharged storm water from their construction site in Lincoln County, South Dakota without first obtaining an NPDES permit and, thereafter, failed to implement the requirements of the State of South Dakota's General Permit for Discharges Associated with Construction Activities. Furthermore, EPA has determined that the Respondents discharged dredged and fill material at the Lincoln County site without first obtaining an appropriate section 404 permit from the Corps. These discharges of pollutants into an unnamed tributary of Ninemile Creek and its adjacent wetlands have occurred on Respondents' property at a site located in the northeast quarter of Section 26, Township 100 North, Range 51 West, in Lincoln County, South Dakota.

Enclosed please find a document entitled "Findings of Violation and Administrative Order for Compliance" ("Order"), which specifies the nature of the violations and describes actions necessary in order for the Respondents to achieve compliance with sections 301 and 404 of the CWA. Pursuant to this Order, within five days after Respondents' receipt of this Order, Respondents must inform EPA in writing of their intent to fully comply with the Order. Also enclosed is the signed "Administrative Compliance Order on Consent" ("Consent Order"), detailing the violations and those actions necessary to achieve compliance with section 402 of the CWA, which Respondents previously reviewed and signed. The Consent Order is now final and Respondents must begin to undertake the steps set forth in the Consent Order according to the time-frames set forth therein. EPA's authority for such actions are provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3).

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that failure to comply with the requirements of the Order or the Consent Order is a violation of that Order and may be enforced through the mechanisms referenced above. Please also be advised that the issuance of these Orders does not preclude civil or criminal actions in U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the Order or the Consent Order or for any other violations that Zelmer, Inc. and/or Spencer Heights, LLC may have committed prior to or may commit after the issuance of the enclosed Orders.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"). SBREFA does not eliminate Respondents' responsibility to comply with the Act or this Order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the Order and the Consent Order carefully. If you have any questions, the

most knowledgeable people on my staff are Sheldon Muller, Enforcement Attorney, at 303-312-6916, Jennifer Meints, NPDES Enforcement Officer, at 303-312-6334, and Kenneth Champagne, Section 404 Enforcement Officer, at 303-312-6608.

Sincerely,

SIGNED

Carol Rushin

Assistant Regional Administrator

Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Section 402 Administrative Compliance Order on Consent
2. Section 404 Findings of Violation and Administrative Order for Compliance
3. SBREFA Information Sheet

cc: Arlie Brende, Esq., w/enclosures
Howard Kenison, Esq., w/enclosures
Jeanne Goodman, SDDENR, w/enclosures
David LaGrone, U.S. Army Corps of Engineers, w/enclosures
Steven Naylor, U.S. Army Corps of Engineers, w/enclosures
Tina Artemis, EPA, 8RC, w/enclosures

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	ADMINISTRATIVE COMPLIANCE
)	ORDER ON CONSENT
Zelmer, Inc., and)	
Spencer Heights, LLC.)	Docket No. CWA-08-2004-0075
27172 469th Avenue)	
Tea, South Dakota 57064)	
)	
Respondents.)	
_____)	

I. INTRODUCTION

1. This Administrative Compliance Order on Consent (“Consent Order” or “Order”) is entered into between the United States Environmental Protection Agency (“EPA”) and the Respondents, Zelmer, Inc., and Spencer Heights, LLC. The Consent Order concerns the completion of compliance actions required to address the environmental damages caused by the discharge of pollutants into waters of the United States at the Spencer Heights subdivision in Lincoln County, South Dakota by the Respondents.

II. STATUTORY AUTHORITY

2. This Consent Order is issued pursuant to the authority vested in the Administrator of the EPA by section 309 of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Consent Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 402 of the CWA, 33 U.S.C. § 1342.

III. PARTIES BOUND

3. This Consent Order shall apply to and be binding upon EPA and shall be binding upon the Respondents, their agents, successors, and assigns. The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Order. No change in the ownership or legal status of Zelmer, Inc. or Spencer Heights, LLC. or ownership of the property that is the subject of this Consent Order shall alter Respondents' responsibilities under this Order.

IV. STATEMENT OF PARTIES

4. Except as otherwise provided in Paragraph 5 of Section IV of this Consent Order, the FINDINGS OF FACT AND OF VIOLATION set forth in Section V of this Order are made solely by EPA. Except as otherwise provided in Paragraph 5 of Section IV of this Order, in signing this Consent Order, the Respondents neither admit nor deny the FINDINGS OF FACT AND OF VIOLATION. In order to provide for the complete resolution of the alleged violations of the CWA and without acknowledging any further liability, the Respondents consent to the issuance of this Consent Order and agree to abide by all of the terms and conditions herein and agree not to challenge the jurisdiction of EPA or the FINDINGS OF FACT AND OF VIOLATION set forth in Section V of this Order in any proceeding to enforce this Order.

5. Respondents specifically admit those FINDINGS OF FACT AND OF VIOLATION set forth in Paragraphs 6 and 7 of Section V of this Consent Order.

V. FINDINGS OF FACT AND OF VIOLATION

6. Zelmer, Inc. is a South Dakota corporation and Spencer Heights, LLC. is a South Dakota limited liability company, both having a registered office address of 27172 469th Avenue, Tea, South Dakota 57064. Zelmer, Inc. and Spencer Heights, LLC both are currently in good

standing with the South Dakota Secretary of State's office and their registered agent is Melvin F. Zelmer.

7. At all relevant times, Zelmer, Inc. and/or Spencer Heights, LLC. owned, controlled and/or operated the property containing an unnamed tributary of Ninemile Creek and its adjacent wetlands located in Section 26, Township 100 North, Range 51 West, Lincoln County, South Dakota (the "Spencer Heights Property").

8. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, unless authorized by certain other provisions of the Act, including section 402, 33 U.S.C. § 1342.

9. Section 502(16) of the Act, 33 U.S.C. § 1362(16), defines "discharge" to include "a discharge of a pollutant, and a discharge of pollutants."

10. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" and "discharge of pollutants," in part, as "any addition of any pollutant to navigable waters from any point source."

11. Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

12. 40 C.F.R. § 122.2 defines "waters of the United States" or waters of the U.S.," in part, as "(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide: (b) All interstate waters, including interstate 'wetlands;' . . . (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; . . . and (g) 'Wetlands' adjacent to

waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.”

13. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (“NPDES”) program, under which EPA and, upon receiving authorization from EPA, states may permit discharges into navigable waters (i.e., waters of the U.S.), subject to specific terms and conditions.

14. Section 402(p) of the Act, 33 U.S.C. § 1342(p), requires that any discharge of storm water associated with industrial activity must comply with the requirements of an NPDES permit.

15. As directed by section 402(p) of the Act, 33 U.S.C. § 1342(p), EPA has issued regulations that further define requirements for NPDES permits for storm water discharges. The regulations include those codified at 40 C.F.R. § 122.26.

16. EPA’s regulations define discharges associated with industrial activity to include construction activity. 40 C.F.R. § 122.26(b)(14)(x).

17. EPA’s regulations require each person who discharges storm water associated with industrial activity to apply for an individual permit or seek coverage under a promulgated storm water general permit. 40 C.F.R. § 122.26(c).

18. Pursuant to section 402(b) of the Act, 33 U.S.C. § 1342(b), on December 30, 1993, EPA approved the application by the State of South Dakota to administer and enforce the national pollutant discharge elimination system (“NPDES”) program for regulating discharges of pollutants into waters within the State. 59 Federal Register 1535, January 11, 1994.

19. Pursuant to South Dakota's approved NPDES permit program, the South Dakota Department of Environment and Natural Resources ("SDDENR") has issued a "General Permit for Storm Water Discharges Associated with Construction Activities" ("South Dakota General Permit" or "General Permit") authorizing discharges of storm water associated with construction activities, as long as such discharges are in compliance with the conditions of the General Permit. The most current South Dakota General Permit became effective July 1, 2002 and will expire on June 30, 2007.

20. The South Dakota General Permit requires, among other things, that the owner, party, person, general contractor, corporation, or other entity ("Operator") that has operational control over a construction project must submit, at least 15 days prior to when the operator commences activities subject to the General Permit, a notice of intent ("NOI") requesting coverage under the General Permit for storm water discharges from the construction site. The General Permit also requires that the Operator prepare, prior to the start of construction, a storm water pollution prevention plan ("SWPPP") and that the Operator confirm in the NOI that such plan has been developed or will be developed prior to commencing construction activities. The SWPPP must include, among other things, provisions for erosion and sediment controls, storm water management and regular inspections.

21. On several occasions, beginning on or before March 27, 2003, the U.S. Army Corps of Engineers visited the Spencer Heights Property and observed construction activities disturbing more than five acres of land.

22. On November 17, 2003, SDDENR conducted an inspection of the Spencer Heights Property. SDDENR found, and EPA through issuance of this Consent Order finds, that the

Respondents had neither applied for nor received a NPDES permit authorizing storm water discharges from their facility. SDDENR also found, and EPA hereby finds, that as of November 17, 2003, the Respondents had not submitted a NOI for coverage under the General Permit, had neither developed nor implemented a SWPPP, and that erosion and sediment controls were not in place.

23. Under cover of a letter dated January 5, 2004, SDDENR conveyed the report of the November 17, 2003 inspection to the Respondents. The letter directed Respondents to submit a NOI to SDDENR on or before January 12, 2004, to submit a SWPPP to SDDENR on or before January 19, 2004, and to “immediately implement maintenance and inspection measures as specified in the ‘general permit for storm water discharges associated with construction activities,’ which was provided to [Respondents] during the inspection.” The letter further directed Respondents to conduct site inspections weekly and within 24 hours following storm events of at least 0.5 inches, maintaining records of the inspections with the SWPPP.

24. On February 4th, 2004, SDDENR received a NOI from the Respondents, and granted permit coverage under the General Permit that same date. However, Respondents have neither developed nor submitted the required SWPPP.

25. Each Respondent is a “person” as that term is defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

26. As “persons,” the Respondents are subject to the requirements of the Act and 40 C.F.R. part 122.

27. At all times relevant to this action, Respondents have been engaged in construction activities at the Spencer Heights Property and, therefore, have engaged in “industrial activity” as that term is defined in 40 C.F.R. § 122.26(b)(14).

28. At the Spencer Heights Property, the Respondents’ construction activities have disturbed an area greater than five acres.

29. Storm water, snow melt and surface runoff and drainage has been leaving the Spencer Heights Property and flowing into an unnamed tributary to Nine Mile Creek and its adjacent wetlands. Nine Mile Creek is tributary to the Big Sioux River, which is tributary to the Missouri River. The Big Sioux River and the Missouri River are and were at all relevant times navigable, interstate waters.

30. The storm water, snow melt and surface runoff and drainage from the Spencer Heights Property is “storm water” as defined in 40 C.F.R. § 122.26(b)(13).

31. Storm water contains “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).

32. The unnamed tributary of Ninemile Creek and its adjacent wetlands, the Big Sioux River and the Missouri River are and were at all relevant times “waters of the United States” within the meaning of 40 C.F.R. § 122.2 and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

33. The storm water runoff from the Spencer Heights Property is the “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.

34. Respondents’ construction activity at its facility is a “point source” as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

35. Activities to be carried out under this Consent Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a).

36. In order to resolve the violations alleged herein by EPA, Respondents have agreed to comply with this Consent Order and agree to abide by all of its terms and conditions herein and agree not to challenge the jurisdiction of EPA or these Findings of Fact in any proceeding to enforce this Consent Order.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF FACT AND OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED and AGREED:

37. Respondents shall not commence or continue any construction activities, including clearing, grading and excavation, at the Spencer Heights Property until they have submitted a SWPPP to EPA and SDDENR that fully complies with the requirements for SWPPPs set forth in the General Permit and implemented the SWPPP.

38. Respondents shall comply fully with all requirements of the General Permit including, but not limited to, all requirements relating to developing and implementing a SWPPP, implementing all best management plans ("BMPs") required by the General Permit and/or the SWPPP, conducting inspections, and submitting a Notice of Termination. Respondents shall:

39. no later than thirty (30) calendar days after the effective date of this Consent Order, submit to EPA and SDDENR a SWPPP that fully complies with the requirements for SWPPPs set forth in the General Permit;

40. no later than thirty (30) calendar days after the effective date of this Consent Order, submit to EPA and SDDENR a time line of all phases of development at the Spencer Heights Property, including the start and end date of each phase of construction from the start of the construction project (including the date initial

ground clearing activities commenced), and the acreage disturbed during each phase; and

41. no later than forty-five (45) calendar days after the effective date of this Consent Order and thereafter within ten (10) calendar days after the end of each calendar quarter (October 10, 2004, January 10, 2005, April 10, 2005, etc.), submit to EPA and SDDENR copies of all inspection reports required pursuant to the general permit prepared during the quarter and written and photographic documentation that all aspects of the SWPPP and General Permit are being implemented, including, but not limited to: (1) erosion, sediment and other controls; (2) good housekeeping practices; (3) storm water management; and (4) BMPs. The quarterly submissions shall continue for the life of the construction project or until written notice is given by EPA that the submissions can cease.
42. If at any time Respondents are notified by EPA or SDDENR that they are not in compliance with the conditions of the General Permit or the terms of the SWPPP, they shall immediately cease all construction activities, including clearing, grading and excavation, at the Spencer Heights Property until such time as they have applied for and been issued an individual Surface Water Discharge permit from the State of South Dakota.
43. All written notices and reports required by this Order shall be sent to the following addresses:

Jennifer Meints (8ENF-W-NP)
U.S. EPA Region 8
Office of Enforcement, Compliance
and Environmental Justice
NPDES Enforcement Unit
999 18th Street, Suite 300

Kelli Buscher
South Dakota Department of
Environment and Natural Resources
Surface Water Quality Program
Joe Foss Building
523 East Capitol

44. Any deliverables, plans, reports, specifications, schedules and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement.

45. Respondents shall allow access by any authorized representatives of EPA and SDDENR or their contractors, upon proper presentation of credentials, to sites and records relevant to this Consent Order for any of the following purposes:

- 7. To inspect and monitor progress of the activities required by this Consent Order;
- 6. To inspect and monitor compliance with this Consent Order;
- 5. To verify and evaluate data and other information submitted to EPA; and
- 4. To review inspection reports required to be prepared and maintained pursuant to the terms of the General Permit, and any other documentation related to Respondents' implementation of the SWPPP and the General Permit.

This Consent Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

- 3. Respondents' obligations under this Consent Order are joint and several.
- 2. The effective date of this Consent Order shall be when it is received by Respondents.

- 1. Respondents understand and acknowledge the following:
- 0. That section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation which occurred before March 15, 2004, and \$32,500 per day for each violation thereafter, of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a), including this Consent Order;
- 1. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA;
- 2. Section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA;
- 3. Issuance of this Consent Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Consent Order;
- 4. Compliance with the terms and conditions of the Consent Order shall not be construed to relieve Respondents of Respondents' obligation to comply with any applicable Federal, state, or local law or regulation; and
- 5. Failure by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Consent Order may subject Respondents to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

6. Each party shall bear its own costs and attorneys fees in connection with this matter.

7. This Consent Order constitutes the final, complete and exclusive agreement and understanding among the parties with respect to the settlement embodied in this Consent Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement of this matter other than those expressly contained in this Consent Order.

8. Each undersigned representative of Respondents certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind such party to this document.

**FOR UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,**

Date: 9/30/04

By: SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice
U.S. Environmental Protection Agency, Region 8

FOR ZELMER, INC.

Date: 9/23/04 By: SIGNED
Melvin F. Zelmer, President
27172 469th Avenue
Tea, South Dakota 57064

FOR SPENCER HEIGHTS, LLC.

Date: 9-23-04 By: SIGNED
Melvin F. Zelmer, Manager
27172 469th Avenue
Tea, South Dakota 57064

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 30, 2004.



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